Supreme Court, U.S.
FILED

No. ___

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IN THE

# Supreme Court of the United States

LORI A. CASS,

*Petitioner*,

—v.—

SUFFOLK COUNTY CORRECTIONAL FACILITY
and ALFRED TISCH, Sheriff,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

There is a disparity between the 2nd circuit and the 9th circuit as to a conflict of interest in representation of an indicted and unindicted coconspirator.

## LIST OF PARTIES TO THE PROCEEDINGS

Lori A. Cass, Petitioner represented by Arthur V. Graseck, Esq. 1870 Spur Drive South, Islip Terrace, New York 11752 and Suffolk County Correctional Facility and Alfred Tisch, Sherriff, represented by Thomas J. Spota, III, District Attorney of Suffolk County, Building No. 77, North County Complex Hauppauge NY 11788

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## PETITION FOR WRIT OF CERTIORARI

Petitioner seeks a review of the decision of the Second Circuit Court of Appeals entered on March 24, 2004.

## OPINIONS BELOW

The Opinion of the Second Circuit Court of Appeals denying petitioners request for Writ of Habeus Corpus, Bail, and a stay of execution of her sentence on March 24, 2004 and the Order of the District Court below from the Eastern District of New York denying the same relief. The relevant opinions of the Court of Appeals and the District Court are annexed herewith at the appendix pages 1a-4a.

## JURISDICTION

Jurisdiction of this court is invoked under Rule 10a.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth amendment to the constitution guarantees the citizens shall be provided with conflict free attorney representation in defense of criminal proceedings. Petitioners was denied her right to conflict free representation in this case as her attorney also represented and unindicted coconspirator. There is a disparity between the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals.

## STATEMENT OF THE CASE

Appellant-Petitioner herein was represented by an attorney who was also representing an unidicted co-conspirator, appellants husband. Initially prosecutors tried to indict both her and her husband for allegations of alleged fraud and scheming to defraud in connection with doing business as an appliance repair shop, selling used parts and performing appliance repair service. A Suffolk County New York Grand Jury only returned an indictment against Appellant-Petitioner. The same attorney pre-indictment represented both Appellant-Petitioner, and her husband an unindicted coconspirator. Shortly after indictment prosecutors sought to seize assets from the un-indicted coconspirator; whom the same attorney as Appellant-Petitioner represented.

When the issue of the testimony of the un-indicted co-conspirator was placed before the court during a Sandoval hearing the attorney representing the Appellant removed the un-indicted coconspirator from the witness list. Presumably to protect the un-indicted coconspirator, who could have given exculpatory testimony of the actions of appellant but may have incriminated himself.

Appellants attorney admits only after Appellant agreed to a plea that he suffered a conflict of interest in his desire to not only protect the Appellant herein, but the unindicted co-conspirator also. Appellant was never advised of the dangers that could in fact arise out of this type of situation, nor was Appellant ever afforded the option to execute a waiver, because Appellant was not aware of the conflict of interest that existed.

The State trial Court was aware of an unrefuted $200,000.00 mortgage between the un-indicted co-conspirator, and Appellant's Attorney, but because Appellants husband the un-indicted coconspirator printed

Appellants name on the Mortgage, allegedly to protect her, the financial relationship went ignored. The State Court did admit on the record its awareness of *Gomberg* issues yet failed to conduct a hearing. The second circuit court of appeals denied the application for a COA, bail, and release.

## ARGUMENT

### POINT I

### THERE IS A DISPARITY BETWEEN THE 2ND CIRCUIT AND THE 9TH CIRCUIT AS TO A CONFLICT OF INTEREST IN REPRESENTATION OF AN INDICTED AND UNINDICTED COCONSPIRATOR

Defense counsel's conflict of interest was so severe that defense counsel was rendered incapable of providing meaningful representation to relator, to whom an excellent disposition would have been available had she been provided her sixth amendment rights.

After a careful review of the case law of the Second Circuit Court of Appeals relator has found no authority relating to a conflict of interests, attributable to simultaneous representation of both an indicted and unindicted coconspirator, however in the absence of the 2nd Circuit precedent pronouncement of the 9th Circuit should be acceptable as precedent; relator should be permitted to appeal, *inter alia*, to enable the 2nd circuit to decide whether it is in agreement with the 9th circuit.

In the case of *Lockhart v. Terhune*, Case No. 99-16010 (3-14-01), a case number involving multiple conspirators and representation by an assigned counsel; where the assigned counsel alleged that the only possible conflict

between his two clients related to the unindicted client's possession of a murder weapon. In representing the client indicted for murder the attorney, Hove, was conflicted as he may have been protecting the unindicted coconspirator. The 9th circuit pointed out that The Supreme Court has held that a conflict gives rise to an adverse affect when it

> " 'prevent[s] an attorney . . . from arguing . . . the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.' " *Wheat v. United States*, 486 U.S. 153, 160 (1988) (quoting *Holloway*, 435 U.S. at 490). *Wheat, supra* describes this case precisely, as Hove was unable to emphasize Galbert's involvement in the Cooper homicide in order to minimize Lockhart's."

This is precisely what happened to Lori Cass when Gary Gramer, her attorney was simultaneously representing Drew Cass an unidicted coconspirator, Mr. Cass was the alleged conspirator who had the assets seized as alleged by the people in Exhibit COA 10 (previously the Peoples Exhibit I and J to their response to the petition for a Writ of Habeas Corpus)

The Ninth Circuit went on to emphasize that it is what counsel felt he had to refrain from doing that creates the conflict. The Court pointed out:

> "The central question that we consider in assessing a conflict's adverse effect is " 'what the advocate [found] himself compelled to refrain from doing' " because of the conflict. Allen, 831 F.2d at 1497 (quoting Holloway, 435 U.S. at 490). Hove " 'suspected or knew' that he had[an] unindicted client who w[as] involved" in the crime. Id. Hove's knowledge puts Lockhart "in an impossible position. He

> cannot know or prove to a reviewing court what his lawyer[ ] had learned from [Galbert], or how that information caused counsel to act or refrain from acting in certain ways." Id. In such a situation, we have held, "the actual conflict[is] too glaring, and the nondisclosure of the conflict too significant, to require any further evidence that [the petitioner's] representation was adversely affected." Id.

Mr. Gramer after some discussion of limiting the questioning, by the prosecutor, of Drew Cass, removed the latter from the witness list. (TT pg.133, line 3-7 COA 4))

It appears that he was removed from the witness list even though he could have exculpated relator by admitting that he alone was a high managerial agent (COA 5) TT pg 22, line 12-17), and that his wife was a mere employee who unequivocally accepted his guidance, as she did in obtaining a criminal defense attorney.

In *Cuyler v. Sullivan* 446 U.S. 335 (1980), the fact that the conflict need not be raised by anyone, and that the trial court has a duty to determine whether such a conflict exists. In relator's claim it is more clear as the trial Judge was aware of the conflict raised and *Gomberg* issues that existed (COA 1), in this application, TT Pg 29, line 7-15) the existence of a conflict alone requires reversal even without the showing of prejudice. *Cuyler, supra,*

> "When the state obtains a conviction through such a trial it is the State that unconstitutional deprives the defendant of his liberty." *Cuyler,* supra, pg. 336

However, in the case at bar even though no objection was raised at trial there was an actual conflict of interests that Mr. Gramer exhibited when, Mr. Gramer

removed the unindicted coconspirator, Drew Cass from the witness list.

> "The court found that both omissions resulted from counsel's desire to diminish the jury's perception of a co-defendant's guilt." *Cuyler*, supra, pg 339

The indicted and unindicted alleged coconspirators were husband and wife the only way that Mr. Gramer could have continued his representation of both the indicted and unindicted alleged coconspirators was to use the formula set forth by the *United States v. Lighthourne,* 104 F 3d 1172, 1176 (9th Cir. 1997) holding that husband and wife waived right to conflict-free counsel after being told that their attorney would not be able to discuss with either of them the possibility of cooperating with the government, that the attorney could not make a motion to waive marital privilege, and that neither could negotiate a plea). There was no disclosure made to relator even though the trial court was aware of the *Gomberg* issues (Trial transcript Pg 29, line 7-15 COA 1)

It is clear from the argument of the District Attorney that the people viewed Drew Cass as a coconspirator but were unable to indict him for a number of reasons.

In a similar case involving alleged drug dealers, the government sought a wiretap to record the conversations of two alleged coconspirators. The wiretap was granted but the government only was able indict one of the alleged coconspirators. *USA v. Christakis*, case no. 99-55298 (9th Cir. 1-30-01) As in the case at bar, there had been a long history of an involvement between the alleged coconspirators. When the other coconspirator was incarcerated, Christakis managed the drug business of the incarcerated defendant. Christakis and the unindicted coconspirator as in the case at bar, were jointly involved in business activities thought to be illegal, the

attorney Sherman who represented Christakis, also represented DiCesare (the unindicted coconspirator). Just as the prosecutor believed that Cass's were jointly engaged in illegal activity, the law enforcement community perceived Christakis and DiCesare as linked. DiCesare had already been convicted on unrelated drug charges. Sherman represented DiCesare and continued to represent him, in negotiations to have the service of his sentence concluded in Italy. Christakis clearly possessed information that could have been used to implicate DiCesare, in exchange for a reduced sentence. Therefore just as in the case at bar, Sherman was clearly representing clients with conflicted interests.

As this court recognized counsel's reluctance to cross-examine coconspirator Drew Cass raised a question as to the quality of representation afforded petitioner. The court declared;

> ". . . . But my problem that if Mr. Gramer gets $200,000.00 from Drew Cass and there is no inquiry by the trial Judge. I am somewhat concerned as to how that isn't prima-facia some indication of a conflict of interest that would truly lead me to believe that it was ineffective assistance, or almost no assistance of counsel." (Hearing Pg 13, herein after COA 6)

The state court's expression of its awareness of *Gomberg* Issues obligated the court to conduct a hearing. (Trial Transcript ages 20-30, COA 1)

The state court's duty to conduct a hearing was not dependent on any objection by the prosecutor, or defense counsel *People v. Gomberg*, 38 N.Y. 921 769

The state court's expression of it's awareness of *Gomberg* issue's unquestionably demonstrated that it

was duty bound to take steps to assure that relator's right to the meaningful assistance of counsel was protected. The criminal court's failure to make the required inquiry after admitting it's awareness of one or more conflict of interests problems, obligated the District Court to place upon respondent the burden of proving petitioner was not prejudiced by the conflict. *Colon v. Fogg,* 603 F2d 403 (2d Cir. 1979), *Glasser v. United States,* 315 U.S. 60 (1942)

Counsel, in representing petitioner, was not acting with a zealous determination to raise every issue, which could reasonably be expected to support her defense but instead, was influenced by such competing considerations as protecting predicate felon Drew Cass from criminal sanctions.

Counsel influenced petitioner to alter the initial plan to call co-conspirator Drew Cass, because of the attorney's desire to prevent the prosecutor from asserting it's right to cross examine the perceived co-conspirator with a view toward obtaining testimony which somehow later could be used against him as a criminal defendant.

Defense Counsel's financial dependence on, and relationship with coconspirator Drew Cass prevented him from pursuing such strategies on behalf of petitioner as contending that any wrongful conduct attributed to her was the doing of coconspirator and in exploring how relator could have benefited by becoming a cooperating witness against coconspirator Drew Cass.

Counsel's financial dependence on and relationship with coconspirator Drew Cass impelled him to have frequent pre-trial conferences with Mr. Cass, he never discussed defense strategies or preparations for trial with Petitioner.

Petitioner's plea of guilty was marred by counsel's non-verbal signals to her as how she should respond to questioning so as to give the Plea, the appearance of propriety.

Petitioner's plea of guilty was marred by State Court's refusal to answer a question she wished to direct to him with respect to coached responses *U.S. v. Fountain,* 777 F2d 351 (7th. Cir.1995);

> ". . . while a plea allocution can often constitute compelling evidence of the propriety of the acknowledgement of guilt, such conduct not reflected in the record as defense counsels nodding of his head to coach the accused, warrants the drawing of the conclusion that events not of record were more significant than the allocution of petitioner"

This is reflected in the transcript of the record. *McMann v. Richardson*, 397 U.S. 759 (1970).

## CONCLUSION

Based upon the cases sighted and the absence of law on this issue in the Second Circuit, it appears that the ninth Circuit which has dealt with these issues holds that where an attorney that represents both a defendant and an unindicted coconspirator involved in the same transactions that there is a conflict that effectively denies the criminal defendant of their right to independent counsel. A graverman is not so much what the attorney may have done in representing the defendant, but what was in the mind of the attorney, and what the attorney may not have done for the defendant had he not suffered this actual conflict.

Dated: Central Islip, New York
June 18, 2004

Respectfully Submitted,

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# APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CV-03-5673 (JS)

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LORI A. CASS,

*Petitioner*,

—against—

SUFFOLK COUNTY CORRECTIONAL FACILITY
and ALFRED TISCH, Sheriff,

*Respondent*.

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JUDGMENT

An Order of Honorable Joanna Seybert, United States District Judge, having been filed on November 19, 2003, denying petitioner's order to show cause, and dismissing the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, it is

ORDERED AND ADJUDGED that petitioner take nothing of respondents; that petitioner's order to show cause is denied; and that the petition for a writ of habeas corpus is dismissed.

Dated: Long Island, New York
December 3, 2003

ROBERT C. HEINEMANN
CLERK OF THE COURT

By: /s/ RALPH BRANDFORTE
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Filed March 24, 2004
03-2996

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of March, two thousand four,

Present:

Hon. Robert A. Katzmann,
Hon. Richard C. Wesley,
*Circuit Judges*,
Hon. Milton Pollack,*
*District Judge*.

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LORI A. CASS,

*Petitioner-Appellant*,

—v.—

SUFFOLK COUNTY CORRECTIONAL FACILITY
and ALFRED TISCH, Sheriff,

*Respondents-Appellees*.

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* Hon. Milton Pollack of the U.S. District Court for the Southern District of New York, sitting by designation.

Appellant, through counsel, moves for a certificate of appealability and a stay of execution of sentence and release pending appeal. Upon due consideration, it is ORDERED that the motion for a certificate of appealability is denied and the appeal is dismissed because the appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). It is further ORDERED that the motions for stay of execution of sentence and release pending appeal and for oral argument are denied as moot.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

OLIVA M. GEORGE
By: Oliva M. George, Deputy Clerk

A TRUE COPY
ROSEANN B. MACKECHNIE, CLERK

JOSEPH M. RODRIGUEZ

March 24, 2004

ISSUED AS MANDATE: April 21, 2004